Supreme Court U.S.
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No. 01-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

RICHARD WAYNE PARKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard A. Hamar
Counsel of record
and a member of this Court
Maria Rivas Hamar
Hamar and Hamar
2437 Briarcrest Road
Beverly Hills, CA 90210
(310) 550-0460
Attorneys for Petitioner

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QUESTIONS PRESENTED

I

May the trial court permit exclusion of the testimony of the lead FBI agent and his admitted lies, that would establish the strong central defense that he manufactured the critical evidence in the case?

II

May the Court of Appeals decline to hear issues of substantial constitutional import that have been well preserved?

III

May the Petitioner, whose jury voted 10-1 in his favor, be placed twice in jeopardy after the refusal to instruct with a classic *Allen* charge, and the failure to poll the jury after less than a certainty that it was "hung"?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

A. District Court 2
B. Circuit Court 4

REASONS FOR GRANTING WRIT 5

I. No person should be convicted with manufactured evidence 5
II. Every appellant in a direct appeal of a criminal conviction should have reasonable access to the Courts of Appeals 6
III. The Petitioner was denied Double Jeopardy protection 7
IV. The question presented is important
A. The clear departure from Supreme Court precedent has been accepted as an important reason to grant *certiorari* 8
B. The prevention of manufacturing of evidence is important. 9

CONCLUSION 9

TABLE OF CONTENTS (CONTINUED)

APPENDIX

Panel decision . . . . . .1a through 7a

Order denying Petition for Rehearing,
Suggestion En Banc 8a

Contemporaneous objection 9a

TABLE OF AUTHORITIES

CASES **PAGE**

Berger v. United States, 295 U.S. 78,
55 S.Ct. 629, 79 L.Ed. 1314 (1935) 9

Chambers v. Mississippi, 410 U.S. 284,
93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 5,8

Kyles v. Whitley, 514 U.S. 419,
115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) 6

Lowenfeld v. Phelps, 484 U.S. 231,
108 S.Ct. 546, 98 L.Ed.2d 568 (1987) 8

United States v. Bosch, 951 F.2d 1546
(9th Cir. 1991) 7

United States v. See, 505 F.2d 845
(9th Cir. 1975) 8

UNITED STATES CONSTITUTION

Fifth Amendment 2,4,7

Sixth Amendment 2,7,8

UNITED STATES CODE PROVISIONS

21 U.S.C.841 (a) (1) 3

21 U.S.C. 846 3

28 U.S.C. 1254 (1) 2

TABLE OF AUTHORITIES (CONTINUED)

RULES

Supreme Court Rule 10 (1) (a) 8

IN THE

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OCTOBER TERM, 2001

No. 01-

RICHARD WAYNE PARKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Richard Wayne Parker, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unreported and is reproduced in the Appendix at 1a-9a. The decision of the panel and the Ninth Circuit on Rehearing and Suggestion for Rehearing En Banc is produced in the Appendix at 8a.

JURISDICTION

The decision of the Court of Appeals was entered on August 1, 2001. Petitioner's timely Petition for Rehearing and Suggestion En Banc was denied on September 19, 2001. This Court has jurisdiction under 28 U.S.C.1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution grants all accused the right "to be confronted with the witnesses against him."

The Sixth Amendment of the United States Constitution also grants all accused the right "to have compulsory process for obtaining witnesses in his favor."

The Fifth Amendment of the United States Constitution states that no person "can be twice put in jeopardy for life or limb."

STATEMENT

A. DISTRICT COURT

This case involves the tale of two jury trials. In the first, with the testimony of the culprit who most likely manufactured the critical evidence of the case and who has admitted lies under oath, the jury voted overwhelmingly 10-1 for the acquittal of the Petitioner. In the second, with the surprise exclusion of this witness and the exclusion of the clear evidence of his dubious character, the jury convicted in an instant.

The severity of the injustice of the exclusion of this central defense is that Petitioner's freedom was blocked by only one juror when the first jury learned of the character of

the offending witness. The Petitioner now languishes in prison for life without the possibility of parole.

Petitioner, a former state police officer, was arrested on July 2, 1998. (R.18)[1]. He was charged with stealing cocaine from an evidence locker where he was employed, and distributing large amounts of cocaine through an informant, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1). (R.257).

The first jury trial began on April 20, 1999. (R. 319). In that case, lead FBI Agent Jester testified, admitting that he lied under oath on two occasions in this matter. (Tr.#1, R.T. 5/12/99, pp.167,186,191). The lies about the involvement of the conspirators, which he admitted to the first jury, are dramatically revealing because he did so within the secrecy of the grand jury. (Tr.#1, R.T. 5/12/99, pp. 167,186,191).

Jester had also taken the linchpin evidence, the cocaine seized from the informants, out of the chain of custody of the neutral chemist. Prior to this time, the chemist, the finger print analyst and several drug dealers that handled these kilograms did not see the rare "17" brand on that cocaine. This brand connected the kilograms distributed by the informant to the stolen cocaine. (Tr.#1, 5/12/99, 44,49,50); (R.T. 10/8/99, pp. 17,52,167). Jester thereafter returned these kilograms to the chemist and directed him to look for the "17" brand anew. The chemist now saw the "17" brand for the first time. (R.T. 10/8/99, 165).

Taking essential evidence out of the chain of a neutral scientist from a different agency and altering that evidence to implicate the Petitioner, utilizes the same modus operandi of secrecy as the lies Jester made in the first proceeding.

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[1] The record shall be referred to as "R" followed by the docket number. The record excerpts filed in the Ninth Circuit shall be referred to as "RE" followed by a page number. the transcripts of the first trial shall be proceeded by "Tr. #1, R.T.", date and page. The transcripts of the second trial shall be referred to as "R.T.", date and page.

Petitioner requested an *Allen* charge during deliberations that lasted twelve days. (Tr.#1, R.T. 6/17/99, pp. 4-6; (R.T. 6/24/99, pp. 5-6). The trial judge left on vacation during the seventh day of deliberations. The substitute judge neither certified he was familiar with the record, gave the Petitioner's *Allen* charge, nor polled the jury after the jury wrote a note that they were "hung." (Tr.#1, R.T. 6/25/99, pp. 1-12).

On June 25, 1999, the substitute judge declared a hung jury. The Petitioner submitted uncontroverted evidence that verified that the jurors voted 10-1 in favor of the Appellant on the counts at issue. (RE.24).

The Petitioner objected to a second trial based on a violation of the Fifth Amendment's Double Jeopardy Clause. That motion was denied. (R. 457).

A second jury was empaneled on October 7, 1999. (R. 550). In the second trial, FBI agent Jester was excluded as a witness after being subpoenaed by the Petitioner. Evidence of his two false statements and other alleged lies demonstrating it was more likely that he altered the essential evidence were also excluded. (R.T. 10/19/99, p. 16). On October 21, 1999, the Petitioner suffered a conviction within fifteen minutes on the same counts that 10-of-11 jurors in the first trial had found in his favor. (R. 578).

B. Circuit Court

On August 1, 2001, the panel found that the trial judge committed error by leaving this matter in the hands of a judge that did not know the record. App. 2a. This was deemed harmless error.

This case was affirmed in a memorandum opinion without reaching the merits of whether it was error to exclude the Petitioner's crucial defense that agent Jester manufactured critical evidence. App. 5a.

The panel sua sponte found that counsel did not prop-

erly object to the exclusion of Jester as a witness on the basis that he manufactured evidence. App. 5a. However, the panel was apparently not aware of the Petitioner's contemporaneous objection to the exclusion of Jester and impeaching evidence that would demonstrate he altered the crucial evidence. App. 9a.

The Petitioner filed a timely Petition for Rehearing and Suggestion En Banc. Counsel argued that the Government conceded that Appellant had preserved at trial the right to Compulsory Process to call Jester as a witness and the right to confront the Government's case. (Gov. Br. 42-46). Counsel attached the transcript page, which had apparently been undetected by the panel, of the clear, contemporaneous objection made by counsel as soon as the trial court stated that she was inclined to grant the government's oral motion to exclude Jester. App. 9a.

Finally, counsel pointed out that, even if counsel had not properly preserved this evidence, the panel should have made a plain error analysis.

The Ninth Circuit denied relief on September 19, 2001. App. 8a.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should issue in this case because the exclusion of the central defense of manufacturing of evidence is in direct conflict with this Court's precedent[2] and because of the other reasons set forth below:

I. NO PERSON SHOULD BE CONVICTED ON MANUFACTURED EVIDENCE

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[2] *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2nd 297 (1973)

In the instant case, the evidence of the alteration of evidence was clear and supported by the character of the lead agent, who admitted to making false statements to the grand jury on two occasions and the fact that he possessed the cocaine under suspicious circumstances.

The denial of the right to call lead FBI agent Jester is a denial of the Sixth Amendment right of Compulsory Process and Confrontation based on *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), because that Petitioner and the instant Petitioner were both deprived of the right to establish that the principal evidence against them had been tampered with.

The exclusion of this central defense made a monumental difference to Petitioner. When Jester testified in the first trial and admitted his false statements under oath, that jury voted 10-1 in Petitioner's favor. When Jester and his impeachment were excluded, the second jury convicted within fifteen minutes.

II. EVERY APPELLANT IN A DIRECT APPEAL OF A CRIMINAL CONVICTION SHOULD HAVE REASONABLE ACCESS TO THE COURTS OF APPEALS

Every Appellant in a direct appeal of a criminal conviction, especially one sentenced to life in prison, should have the right to have the Circuit Court render a decision on a claim that goes to the very fabric of whether a defendant has received a minimally fair trial.

In the instant case, the Ninth Circuit did not reach this issue because it ruled that it had not been preserved. App. 5a.

However, the Appellate Court raised waiver sua sponte after the Government conceded the issue had been well preserved. (Gov. Br. pp. 44-45).

Even assuming arguendo, that the issue had not been preserved, the Court failed to follow established Ninth Circuit

law and make a plain error analysis. *United States v. Bosch*, 951 F.2d 1546, 1554 (9th Cir. 1991).

On a Petition for Rehearing, this Petitioner attached the transcript page of the Petitioner's contemporaneous objection. It clearly demonstrated that as soon as the government raised the surprise oral objection to calling Jester and the Court immediately concurred, Petitioner explained the relevancy. "Well, Jester was the one that took the kilos out of the chain of custody of Scott Oultan, the D.E.A. lab, and had them for several months and then brought them back. It relates to the chain of custody, relates to the handling of evidence." (R.T. 10/15/99, p. 144); App. 9a.

The trial court had been through two trials and continuously heard the defense of Jester's alteration of the kilograms after he had taken them out of the custody of Scott Oultan. It was clear that the relevance of Jester's testimony related to his alteration of evidence while he had exclusive possession of it, out of the chain of custody.

Thus the failure to consider the issue of the exclusion of the central defense of Petitioner, denied this Petitioner access to the Circuit Court on the substantial constitutional issues of Compulsory Process and Confrontation[3].

III. THE DENIAL OF DOUBLE JEOPARDY PROTECTION

Every defendant in the land is entitled to the Fifth Amendment protection to Double Jeopardy. In the first trial of this case, the Petitioner labored through a twelve week trial with twelve days of deliberations. In the last five days of jury deliberations, the Petitioner had a substitute judge who did not know the record. App. 2a.

That judge dismissed the jury without a requested *Allen* charge asking the minority to consider the opinion of

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[3] The government attempted to prove the "17" connection through 7 of 22 witnesses. FRAP 10.

the majority. *Lowenfeld v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1987). Additionally, the substitute judge dismissed the jury without asking one question after they had returned with a "hung-jury." This violates established law regarding manifest necessity. *United States v. See*, 505 F.2d 845 (9th Cir. 1975).

IV. THE QUESTION PRESENTED IS IMPORTANT

A. The clear departure from Supreme Court precedent has been accepted as an important reason to grant *certiorari*

The Rules of this Court state that "a departure from the usual course of judicial proceedings, or the sanctioning of such a departure by a lower court", calls forth the exercise of this Court's supervisory power. Supreme Court Rule 10 (1) (a).

Even the Government, in its brief filed in the Ninth Circuit, could not find one case in the land that supported the exclusion of a principal defense to its charges based on the right of Compulsory Process. (Gov. Br. pp. 42-46).

The Government was similarly hard pressed on the issue of Confrontation, submitting cases readily distinguishable in the Seventh Circuit. (Gov. Br. pp. 42-46).

The Government's difficulty stems from the fact that this Court has spoken so emphatically on this issue.

The denial of the right to call lead FBI agent Jester as a witness to establish his tampering and his proclivity to lie, violates the Sixth Amendment right of Compulsory Process and Confrontation. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) mandates that Defendants need not be content to "chip away" at the prosecution's case, but must be allowed to call the witness that best enables the defendant to support his central defense.

It is, therefore, readily apparent that there is a clear,

direct conflict between the decision of the Ninth Circuit and a decision of this Court.

B. The prevention of manufacturing of evidence is important

The time honored axiom that the Government should strike hard blows, but not foul blows is essential to an honorable judicial system. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The manufacturing of evidence to obtain a conviction strikes at the very heart of a fair proceeding. The evidence of manufacturing is so apparent that to suppress this defense from a jury and to fail to consider this error by an appellate court, is boldly in conflict to the law promulgated by this Court of Last Resort.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of *Certiorari* should be granted.

Respectfully Submitted,

Richard A. Hamar
Counsel of Record and
a Member of this Court
Hamar and Hamar
2437 Briarcrest Road
Beverly Hills, CA 90210
(310) 550-0460
Counsel for Petitioner

November 6 , 2001

Appendix

Appendix

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 00-50078

D.C. NO. CR-98-00749-CAS

v.

RICHARD WAYNE PARKER,

Defendant-Appellant,

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted July 11, 2001
Pasadena, California

Before: HUG, GRABER, and W. FLETCHER, Circuit Judges.

Defendant Richard Wayne Parker appeals his convictions on once count of filing a false income tax return, 26 U.S.C. § 7206(1); one count of conspiracy to possess cocaine, 21 U.S.C. § 846; and three counts of possession with intent to distribute cocaine, 21 U.S.C. § 841(a). We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

1. The Substitution of Judge Matz

The trial judge who presided over the first trial, Judge Snyder, erred in allowing Judge Matz to preside over part of the jury deliberations. Under Federal Rule of Criminal Procedure 25(a), it is "improper" for a presiding judge who "was not ill or otherwise disabled, but merely had a prior commitment," to engage a substitute judge, and Judge Matz never certified that he was familiar with the record. United States v. Lane, 708 F.2d 1394, 1396 (9th Cir. 1983). However, "procedures that do not strictly comply with Rule 25(a) have been upheld by this court if the defendant has not suffered any prejudice." Id. at 1396-97. Defendant argues that he was prejudiced in four ways. None is persuasive; the error was harmless.

A. The Dismissal of Juror Vickers

First, Defendant argues that he was prejudiced by Judge Snyder's "improper" dismissal of juror Vickers. We review for abuse of discretion a district court's decision to excuse a juror for "just cause" under Rule 23(b). United States v. Beard, 161 F.3d 1190, 1193 (9th Cir. 1998).

Here, the "just cause" was Vickers' vacation, for which she had purchased nonrefundable tickets. We have affirmed a district court's decision to excuse a juror for that reason. United States v. McFarland, 34 F.3d 1508, 1512 (9th Cir. 1994). Under McFarland, the district court did not abuse its discretion in excusing Vickers.

B. The Tax Conviction

Second, Defendant argues that he was prejudiced because his conviction for filing a false income tax return was

the result of the "illegal" dismissal of Vickers. Because the dismissal of Vickers was permissible, this argument also fails.

C. The Bond Hearing

Third, Defendant argues that he was prejudiced because he did not have a bond hearing immediately after the end of the first trial. Plaintiff is not arguing that the district court erred in denying his motion for bail. Rather, he is arguing only that he was prejudiced by the eleven-day delay between the end of the trial and the bond hearing. Nothing suggests that the modest delay affected the denial of bail; there was no prejudice.

D. The Allen Charge

Finally, Defendant argues that he was prejudiced because Judge Matz gave the Allen charge that Judge Snyder had chosen, rather than the Allen charge that Defendant had proposed. Contrary to his assertion that he was denied the opportunity to argue about the Allen charge before an Article III judge, Defendant argued about the charge before both Judge Snyder and Judge Matz.

We review for abuse of discretion a district court's decision on whether to give an Allen charge and its decision on how to word the instruction. United States v. Wills, 88 F.3d 704, 717 (9th Cir. 1996). Here, the court gave Ninth Circuit Model Criminal Jury Instruction No. 7.6, which we have approved. United States v. Daas, 198 F.3d 1167, 1180 (9th Cir. 1999), cert. denied, 121 S. Ct. 498 (2000); United States v. Hernandez, 105 F.3d 1330, 1334 (9th Cir. 1997). Even if Defendant's proposal was as good or better, under Daas, and Hernandez the form given was not an abuse of discretion.

II. Double Jeopardy

In a related assignment of error, Defendant argues that the district court's refusal in the first trial to give his form of an Allen instruction or a second Allen instruction violated the Double Jeopardy Clause, because proper instructions would have resulted in an acquittal in the first trial. We already have disposed of the former argument. With respect to the latter, a second Allen charge would have been impermissible coercive in the circumstances. See Daas, 198 F. 3d at 1179; Hernandez, 105 F. 3d at 1333. Accordingly, there was no error.

III. The Tax Conviction

Defendant also argues that he was deprived of the right to testify without the stigma of a felony conviction at the second trial because of his "unlawful" conviction, in the first trial, for filing a false income tax return. In order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Luce v. United States, 496 U.S. 38, 43 (1984). Defendant did not testify at the second trial. Therefore, this argument is waived.

IV. Claim of False Testimony

Defendant claims that the government knowingly used perjured testimony in the first trial. Our review of the record leads us to conclude, as did the district court, that the testimony to which Defendant refers was not false.

V. Sixth Amendment

Next, Defendant argues that the district court violated his compulsory process and confrontation rights under the

Sixth Amendment by refusing to allow him to call Breamer as a witness and by limiting his direct examination of Jester.

A. Breamer

Defendant contends on appeal that he should have been allowed to call Breamer to ask him whether he had seen the number "17" written on any of the packages of cocaine that he had handled. However, Defendant never told the district court that he wanted to call Breamer for that purpose, either in his written proffer or at the hearing on this issue.

Defendant also argues that he should have been allowed to call Breamer to testify about Pitto's "need to store her drug profits in a secure location." We agree with the district court that Defendant was, in effect, attempting to call Breamer as an unqualified expert witness, to testify about what drug dealers do with their money generally. The district court properly excluded Breamer's testimony.

B. Jester

Defendant asserts that he should have been allowed to call Jester to explore the question whether Jester had marked a "17" on the cocaine seized from Hensel. Again, Defendant did not state in his proffer that he wanted to call Jester for this purpose. Defendant appears to argue that general statements in his written proffer should be construed broadly, to preserve this argument for review. But the district court held a hearing on this issue. At that hearing, defense counsel argued at length about why he should be allowed to call Jester, but he never mentioned this theory. In the circumstances, the district court cannot be faulted for failing to allow Jester to testify on this basis.

Second, Defendant argues that he should have been

allowed to call Jester to ask him about photocopies of the $38,000 that he gave to Hensel, which photocopies Jester apparently lost. The evidence about the missing photocopies was irrelevant. Hensel gave the $38,000 to Pitto, who did not give it to Defendant but, instead, returned it - still in its package - to FBI agents. Defendant never had the $38,000. Defendant was not charged with any offense related to the $38,000. The district court properly concluded that Defendant sought to raise this issue solely to impeach jester with irrelevant material.

VI. Expert Testimony about "Drug Ledgers" and "Fountainhead"

Finally, Defendant argues that the district court improperly allowed Drug Enforcement Agency agent William Bodner to testify as an expert at the second trial. Bodner testified about the "drug ledgers" that agents seized from Defendant's home and about "Fountainhead," a government database that records "brands" (Markings on packages) of cocaine that have been seized b the governments of the United States and of the other countries that contribute to the database.

A. The "Drug Ledgers"

Defendant argues that Bodner's testimony about the "drug ledgers" was (1) unreliable and (2) improper evidence of "other bad acts". Defendant's first argument is waived. Defendant's second argument is that Bodner's testimony about the drug ledgers was, in effect, evidence of a second, uncharged, conspiracy. The district court noted that the government has argued all along that Defendant was part of a drug ring that split profits. Accordingly, the court concluded that this was not evidence of uncharged bad acts; it was evidence that supported the government's theory about the very

crimes with which Defendant was charged.

Defendant argues on appeal, however,that Bodner's testimony effectively charged him with participating in a second, uncharged conspiracy. The alleged members of the first conspiracy were known. Bodner did not explicitly say that he was talking about other, unknown participants; indeed, he never mentioned such a possibility. But he must have been talking about unknown co-conspirators, Defendant says, because "Bodner admitted that these other partners of the Appellant were not Pitto, Breamer, Hensel, the acquitted co-defendants nor anyone involved in the instant Indictment."

The problem with Defendant's argument is that it misstates Bodner's testimony. Bodner never "admitted" anything of the kind. He simply testified that the ledgers appeared to show large sums of money being divided three ways.

Without that material misstatement of the record, Defendant's argument evaporates .The idea that money was split among partners is consistent with the way the government charged, tried, and argued this case.

B. "Fountainhead"

Defendant also argues that the district court abused its discretion in allowing testimony about Fountainhead. This court previously has approved of the use of testimony concerning Fountainhead in a criminal trial. See United States v. Klimavicius-Viloria, 144 F.3d 1249, 1258 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999). Our conclusion in that case that the evidence from the database was "persuasive" and "len[t] strong support" to the government's case, id., demonstrates that the district court in this case did not abuse its discretion in allowing testimony about Fountainhead.

AFFIRMED.

FILED
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 00-50078

D.C. NO. CR-98-00749-CAS

v.

RICHARD WAYNE PARKER,

Defendant-Appellant,

ORDER

Before: HUG, GRABER, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehering and petition for rehearing en banc are DENIED.

(REPORTER'S TRANSCRIPT 10/15/99, p. 144)

told Agent Vincent certain things. I did the same thing with Hensel. The Hensel situation is the marijuana. I mean, Agent Vincent is real specific on what Hensel said.

We are calling those witnesses, as we are always allowed to do, to impeach the government informants. There is no other witness that we are calling just to impeach that witness.

MS. O'CONNELL: Frank Jester - - can I talk to him? You're going to call Frank Jester to the stand and ask Frank Jester whether he made inaccurate - - this is the representation in front of the jury - - whether or not Special Agent Jester made inaccurate statements in the grand jury about defendants whose cases have already been resolved. That is precisely what the authorities which we will cite to Your Honor prohibit.

THE COURT : Well, I agree, and I don't think - - I can not understand any circumstances under which he'd be able to call Frank Jester at this stage.

MR. HAMAR: Well, Jester was the one that took the kilos out of the custody of Scott Oulton, the DEA lab, and had them for several months and then brought them back. That's a fact in this case. It relates to chain of custody, relates to the handling of evidence. I think that's - -

Now, the other thing is that we've calling Jester on the $38.000 as we did last time. I mean, I also called Jester to show - - because he was the case agent up until Vincent